No. 13345

United States
COURT OF APPEALS
for the Ninth Circuit

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PORTLAND GENERAL ELECTRIC COMPANY,

Intervenor.

Petition for Review to Set Aside Order of the Federal Power Commission.

PETITIONERS' BRIEF

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or off the project area, if and to the extent that the inclusion of such property is a part of the project is approved or acquiesced in by the Commission; *also all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance and operation of the project.*" (R. 375, 433.)

"The refusal of the Oregon Fish Commission, acting under an existing law of the State of Oregon, to issue a permit for the Pelton project, is not a bar to the issuance of a Federal Power Act license and to the construction and operation of the proposed project under such license, if that project is found to meet the standards specified for comprehensive waterpower development in the Federal Power Act." (R. 375, 433.)

"Any rights to the use of waters in the Deschutes River and its tributaries in connection with the Licensee's project under this license shall be subordinate to (R. 433):

"(i) All existing rights, whether or not perfected, to the waters of the Deschutes River and its tributaries for domestic, stock, municipal and irrigation purposes, including the right to store any such waters in the proposed Benham Falls, Post and Prineville reservoirs and in the existing Crane Prairie, Crescent Lake, and Wickiup reservoirs; and (R. 443)

"(ii) The use of additional flows of the Deschutes River and its tributaries pursuant to rights which may be initiated hereafter for the diversion and storage of waters for domestic, municipal, stock and irrigation purposes in connection with any reclamation projects undertaken pursuant to the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplementary thereto),

the amounts of water to be used under the additional rights, together with the uses under existing rights whatever they may be, not, by reason of the additional right, to exceed these quantities:

"(a) Deschutes River and its tributaries above Cline Falls—entire flow (R. 443, 444);

"(b) Squaw Creek — all flows during the non-irrigation season (R. 444);

"(c) Lake Creek — 20,000 acre-feet annually (R. 444);

"(d) Crooked River and its tributaries — all the flows above the Highway Bridge at the place where U. S. Highway 97 crosses the Crooked River Canyon (R. 444);

"(e) Crook River below the Highway Bridge — not to exceed 2,500 acre-feet annually for the proposed Deschutes project domestic water system; and (R. 444)

"(f) An additional 400 second-feet that may be taken above the Licensee's project either from the Deschutes River below Cline Falls or the Crooked River below the Highway Bridge during the irrigation season." (R. 444.)

The Petitioners in the Petition for Review (R. 512-515), set forth fifteen findings of fact made by the Federal Power Commission in its Opinions and Order, issuing a license herein, which findings Petitioners contended were not supported by substantial evidence.

In order to avoid duplication, and also to relieve the Court of the burden and the necessity of perusing cumulative and repetitious argument concerning this phase of the case, the Isaak Walton League of America, Oregon Division *amicus curiae,* will, in its Brief to be filed herein, argue these points.

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8. Under the Constitution and laws of the State of Oregon, no person may construct a dam in any of the streams of this State to a height that will make a fish ladder or fishway thereover impracticable, without first having obtained from the Fish Commission of Oregon a permit to construct such a dam.

9. Under the provisions of Section 116-401, O.C.L.A., all waters within the State of Oregon, from all sources of water supply, belong to the public.

10. The common law doctrine of riparian rights has been abrogated in Oregon by statute.

11. Under the Constitution of Oregon, 1859, the rights, title, and interest in and to all water from the development of water power, and to water power sites which the State of Oregon owns or hereafter acquires, shall be held in perpetuity.

12. Under the provisions of the Oregon Water Code, the waters of the State of Oregon may not be appropriated without its consent.

13. No right to appropriate or to use the waters of the lakes, rivers, streams, or other bodies of water within the State of Oregon, including water over which the State has concurrent jurisdiction in connection with the development of any water power project for the generation of electricity, shall be initiated, perfected, acquired or held, without the consent of the State of Oregon.

14. The Federal Power Commission may not act as a substitute for the local authorities over such questions as the right to use, appropriate, divert, or impound the waters of a non-navigable stream in the State of Oregon.

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15. The Federal Power Commission has no authority to allocate the use of the waters of the Deschutes River and its tributaries in connection with the Pelton project under the license granted to the Portland General Electric Company.

16. The Federal Power Commission has no authority to grant to the Portland General Electric Company, the applicant, a license to construct the project in question until the applicant has complied with Section 9(b) of the Federal Power Act by showing compliance with the laws of the State of Oregon.

17. The Fish Commission of the State of Oregon has denied a permit to the Portland General Electric Company to construct the Pelton Dam.

18. The Hydroelectric Commission of Oregon has denied the Portland General Electric Company's application, and supplemental applications, for a preliminary permit to construct the hydroelectric project in question.

CASES CITED

FEDERAL STATUTES CITED

STATE STATUTES CITED

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PORTLAND GENERAL ELECTRIC COMPANY,

Intervenor.

Petition for Review to Set Aside Order of the Federal Power Commission.

PETITIONERS' BRIEF

MAY IT PLEASE THE COURT:

I.

STATEMENT OF THE CASE

This Brief is filed in support of the Petition for Review to set aside an order of the Federal Power Commission, granting license (major) to the Portland Gen-

eral Electric Company, Intervenor, to construct, operate and maintain a hydroelectric project on the Deschutes River, an interior, non-navigable river of the State of Oregon, and the right to use, divert and impound the waters in the Deschutes River and its tributaries, all interior, non-navigable rivers of the State of Oregon.

The State of Oregon, in its sovereign capacity, the Fish Commission of Oregon, and the Oregon State Game Commission, the last both being administrative agencies and commissions of the State of Oregon, charged with the administration of the commercial fishing and fisheries laws, and the management, protection, preservation, propagation and promotion of game fish, respectively, in said State, are the Petitioners herein.

The Intervenor, the Portland General Electric Company, is an electric public utility corporation, organized under the laws of the State of Oregon, with its principal office in the City of Portland, Oregon. It is engaged as such public utility in the business of generating, transmitting and selling electric energy in said State of Oregon.

Petition for Review was filed herein in compliance with Rule 43 of this Court, and with Section 313(b) of the Federal Power Act, (49 Stat. 860, T. 16 U.S.C.A., Sec. 825(b)).

The State of Oregon, the Fish Commission of Oregon, the Oregon State Game Commission and the Sellwood Chapter (Portland, Oregon), Izaak Walton League of America, Inc., intervened in this proceeding before the Federal Power Commission and opposed and ob-

jected to the issuance of a license to the Portland General Electric Company authorizing it to construct, operate and maintain the proposed hydroelectric project on the Deschutes River in Oregon (R. 242, 243).

The Tribal Council for the Warm Springs Indian Reservation of Oregon was a party to this proceeding before the Federal Power Commission. It offered no objection to the issuance of a license for the proposed project (R. 354).

An application for a license under the Federal Power Act was filed on May 23, 1949 (R. 117-170), by the Northwest Power Supply Company of Portland, Oregon, a corporation originally formed in 1949 under the sponsorship of three operating utility companies in the region for the principal purpose of obtaining a license for development of a hydroelectric site on the Deschutes River in Oregon, known as the Pelton Site. Subsequently, two of the sponsoring companies became interested in other power developments, leaving Portland General Electric Company of Portland, Oregon, as the only sponsoring company directly interested in the proposed development. A supplement to the application filed in June, 1951, states that the Portland General Electric Company has become the applicant for a license (R. 244). A public hearing on the application was held in Portland, Oregon, commencing on June 11, 1951 (R. 237). Petitions for permission to intervene in this matter as formal parties were filed by the Attorney General of the State of Oregon, the Oregon Fish Commission, the Oregon State Game Commission and the

Oregon Division of the Izaak Walton League of America, Inc. (R. 305, 309). These petitions were granted (R. 242, 43). During the course of the public hearing, oral and documentary evidence was presented in opposition to and in favor of the proposed project.

The proposed project would consist of a concrete arch dam approximately 205 feet high (R. 325), a reservoir with a normal pool at elevation 1,580 feet (R. 325), (which will be drawn down six feet in normal operation), three short penstocks, a side channel and tunnel spillway, an outdoor type powerhouse located near the dam containing three 52,000 (R. 325) horsepower turbines operating under a gross head of about 152 feet connected to three 36,000 kilowatt generators (a total capacity of 108,000 kilowatts), and related facilities, including a switching station and a 230 kv transmission line (R. 325). In addition to these power facilities, the project would include a second, but smaller, re-regulating dam located about three miles downstream from from the power dam. Behind this smaller dam, which would perform no power functions, but would serve to iron out the fluctuating flows produced by the power production at the main dam, there would be a small reservoir with normal pool level at elevation 1,422 (R. 325).

Construction of the proposed project would prevent free passage of anadromous fish in the Deschutes River and would result ultimately in their total destruction (R. 699-703) (R. 436). These fish are dependent on spawning grounds for survival, all of which are above

the Pelton Site, 154 miles of which are known, by actual survey, to contain various grades of spawning gravel. Fish laddders over a dam of this height are impractical, for the reason that it is impossible for anadromous fish to use ladders of such height (R. 699). For this reason Portland General Electric Company, in addition to the works generally outlined above, proposed to install certain facilities at the project for the purpose of holding anadromous fish below the dam relieving them of their eggs so that the eggs could be transported by truck to a hatchery for artificial rearing of the fingerling fish which, under natural conditions, would have been produced in the waters above the dam (R. 325, 326).

The Deschutes is an interior, nonnavigable river of the State of Oregon and is a tributary of the Columbia River (R. 330). A setting forth of some general facts relative to the geography, topography and stream flow may be helpful in understanding the issues of this case.

The Deschutes River rises near the summit of the Cascade Range and flows northward along the foot of the eastern slope to join the Columbia River at a point about 15 miles upstream from The Dalles, Oregon. The drainage basin, with an area of about 10,500 square miles, has a shape somewhat like an inverted Y, and Little Deschutes River forms the drainage pattern of the western arm. Twenty miles below its junction with Little Deschutes River, the main stream flows through Bend, the most important city in the basin (R. 327).

About 55 miles north of Bend, two important tributaries, the Metolius and Crooked Rivers join the main

stream, from the west and east, respectively, and at that point the flow from springs greatly augments the run-off which is depleted by irrigation diversions above Bend. Only two other important tributaries, Warm Springs River and White River at mile 84 and mile 47, respectively, enter the stream below Bend. Most of the basin is covered with timber, and this timbered area includes all of Deschutes National Forest, and portions of Mt. Hood and Ochoco National Forests. Topography of the basin is generally broken and rugged, except for the Central Oregon plateau and the comparatively level bench lands in the mid-valley section. Throughout the lower 130 miles, the river flows in a narrow canyon with an average fall of 17.6 feet to the mile. The agricultural lands consist largely of high table lands cut by deep canyons through which the rivers flow and small arable areas which border the streams. The soil is a *coarse,* disintegrated lava and the rocks of the entire area are volcanic and very porous. The river valley varies in width from 200 to 1,200 feet (R. 328).

The geological formations, being porous in nature, act as underground reservoirs regulating run-off from the basin. The Deschutes River has perhaps the most uniform flow of any river of comparable size in the Columbia River Basin, and has a maximum discharge near Madras, which is in the vicinity of the proposed project, of about 13,300 cubic feet per second, the minimum at the same point being about 2,900 cubic feet per second. The mean annual run-off near Madras is 3,011,800 acre-feet, and the average flow is about 4,200 cfs (R. 328).

Flow in the Deschutes is remarkably uniform, and because of the geological conditions in the basin, large floods are not regarded as probable in any part of the basin except on Crooked River, which enters the Deschutes from the east at mile 113, or about 10 miles above the proposed project. No floods causing major damage are known to have occurred (R. 328).

Metolius and Warm Spring Rivers are the principal salmon supporting tributaries of Deschutes River. These streams support runs of spring chinook salmon and steelhead trout. Falls and dams above the confluence of Metolius River block the upstream passage of andromous fish. The Oregon Fish Commission has constructed and put into operation a salmon hatchery on Metolius River. The Deschutes River has numerous rainbow, cutthroat, German brown trout, steelhead and salmon and is nationally known for its sport fishing (R. 329).

Seasonal low flows of Deschutes River and its tributaries above Bend are completely appropriated and are used primarily for irrigation of lands lying east of the river (R. 329).

The proposed project would occupy lands of the United States and would affect the Warm Springs Indian Reservation (R. 331) (433).

On January 20,. 1949, four months prior to the filing of its application with the Federal Power Commission, the Northwest Power Supply Company filed with the Hydroelectric Commission of Oregon an application for a preliminary permit, Project No. 170, commonly known

as the Pelton Project, for authority to appropriate 7,040 cubic feet per second of water from the Deschutes River for the purpose of developing 120,000 theoretical horsepower under a head of 150 feet and to construct a dam and powerhouse at the Pelton Site (Ex. 8).

This application was filed in compliance with the terms of Title 119, Ch. 1, Sec. 119-101 et seq., Oregon Compiled Laws Annotated, which, in substance, provides that no water-power project involving the right to use or appropriate the waters of any rivers or other bodies of water within the State of Oregon, for the generation of electricity shall be begun or constructed except in conformity with the provisions of said Act, which, among other things, provides for the issuance of a preliminary permit by the Oregon Hydroelectric Commission before any such water-power project shall be initiated.

Section 83-316, Oregon Compiled Laws Annotated (Oregon Laws 1921, Ch. 105, Sec. 49), provides in substance that in the event any person desires to construct a dam in any of the streams of Oregon to a height that will make a fish ladder or fishway therover impracticable in the opinion of the Oregon Fish Commission, then such person may make an application to the Commission for a permit to construct the dam. The Oregon Fish Commission is authorized to grant such permit in its discretion on the condition that the person so applying for such permit shall convey to the State of Oregon a site of the size and dimensions satisfactory to the Fish Commission, at such place as may be selected by said Commission, and shall erect thereon a hatchery residence

in accordance with plans and specifications to be furnished by the Commission. The act further provides that such person shall enter into an agreement with the Commission secured by bond to furnish all water and light without expense, to operate said proposed hatchery. This act further provides that the Fish Commission shall not issue a permit for the construction of an such dam until the person applying for such permit shall have actually conveyed said land to the State and shall have erected said hatchery and hatchery residence thereon in accordance with said plans and specifications.

A public hearing was held on said application by the Hydroelectric Commission. It found that the Deschutes and Metolius Rivers are spawning grounds for anadromous fish; that the proposed dam would be of such height that fish ladders or fishways would be impracticable and that the release of water from said river for peaking purposes would endanger the lives of fishermen and would be injurious to young fish. Based on these findings the Hydroelectric Commission, on July 1, 1949, issued the following order (Ex. 8):

"1. That the Northwest Power Supply Company file with the Hydroelectric Commission of the State of Oregon, made pursuant to Section 83-316, O.C.L.A., for a permit to construct, at its Pelton site on the Deschutes River, a dam of a height which will make a fish ladder or fishway therefore impracticable.

"2. That the applicant file with the Hydroelectric Commission of Oregon, a statement from the Fish Commission of the State of Oregon, or a certified copy there-

of, that said Fish Commission will issue such a permit, pursuant to the provisions of said Section 83-316, showing compliance therewith.

"3. That the applicant be and it hereby is notified that should a preliminary permit be granted by the Hydroelectric Commission, it will be required to submit to the Commission plans for either eliminating or regulating the operational fluctuations of water below the dam to an amount which will not be dangerous to human life or injurious to fish life." (Ex. 8)

Therefore, in obedience to said order, the Northwest Power Supply Company applied to the Oregon Fish Commission for a permit to construct said dam. The applicant stated that it would construct a fish hatchery and convey it to the State in conformity to the above-mentioned statute. After careful consideration of the application and based on information obtained from its own investigation together with information obtained from the Oregon State Game Commission and the United States Fish and Wildlife Service, the Oregon Fish Commission denied the application for the reasons generally that the State would suffer great financial loss in being compelled to abandon its fish hatchery on the Metolius River; that federal funds in the amount of $220,000 for the future Development of said fish hatchery were then being withheld pending the outcome of said application and that the fish handling facilities proposed by the applicant in lieu of fish ladders were impracticable (Ex. 9).

Subsequently, the Portland General Electric Company, as successor in interest to the Northwest Power Supply Company, filed an application with the Oregon Fish Commission for a reconsideration of its former action denying the application of the Northwest Power Supply Company. It is proposed, as a substitute for the free passage of fish up the river, to construct facilities below the dam for holding adult salmon and steelhead until they were ready to spawn and to pay $100,000 a year toward the cost of transporting the eggs to the State's hatchery on the Metolius River and for transporting the fingerlings from the hatchery to a point below the dam for release or, in lieu of this, it proposed to acquire a site on the Warm Springs River in the Indian Reservation and to construct a hatchery thereon to be used in lieu of the present hatchery of the State located on the Metolius River. This application was likewise denied by the Oregon Fish Commission for substantially the same reasons that it denied the application of the Northwest Power Supply Company. The reasons for the denial for both these applications will appear more fully in copies of the orders of the Oregon Fish Commission which will be contained in the printed record to be filed later in this case (Ex. 9).

By order dated September 7, 1951, the Hydroelectric Commission of Oregon denied the application of the Northwest Power Supply Company and the Portland General Electric Company for reconsideration of the former order of said Commission heretofore referred to, for the reason that the applicant had failed to comply with the requirements of the order of said Commission

of July 1, 1949. This order is not a matter of record in the transcript of evidence before the Federal Power Commission in this proceeding. However, a certified copy of such order was mailed in the transcript of evidence before the Federal Power Commission in this proceeding. However, a certified copy of such order was mailed to Mr. Leon M. Fuquay, Secretary of the Federal Power Commission, Washington, D.C., and the Portland General Electric Company, Portland, Oregon, by Mr. Charles E. Stricklin, Secretary of the Hydroelectric Commission of Oregon, both on October 17, 1951. A certified copy of this order was placed in the custody of the clerk of this Court for inspection by the Court on the hearing of this petition.

The Federal Power Commission found that the Deschutes River is a nonnavigable stream; that the proposed project would not affect interstate or foreign commerce; that the operation of the proposed project in conjunction with the re-regulating dam would prevent the project from adversely affecting interests downstream since substantially all the natural river flow will be released through the dam at all times; that the proposed project will occupy lands of the United States; that under Section 10(a) of the Federal Power Act, the proposed project is in the public interest and will provide for comprehensive development of the Deschutes River and will be consistent with further comprehensive development of that stream and of the Columbia (River) Basin (R. 418, 423, 425).

The Petitioners contend that the Federal Power Commission erred in holding:

"The proposed project, if constructed, would occupy lands and a reservation of the United States. Therefore, construction of the project without a license from this Commission would be unlawful." (R. 332, 433).

" * * * that there is no State law which would by its own terms prohibit construction of the project, although the two State Commissions have so far refused to issue the permits or licenses." (R. 341).

" * * * it is clear that the State laws involved cannot stand as a complete legal bar to Federal authorization of a project lacking a State permit if, in the judgment of the Commission, that project is best adapted to comprehensive plans and would be of unmistakable public benefit." (R. 433).

"All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project of any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property is a part of the project is approved or acquiesced in by the Commission; *also all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance and operation of the project.*" (R. 375, 433).

"The refusal of the Oregon Fish Commission, acting under an existing law of the State of Oregon, to issue a permit for the Pelton project, is not a bar to the issuance of a Federal Power Act license and to the construction and operation of the proposed project under

such license, if that project is found to meet the standards specified for comprehensive waterpower development in the Federal Power Act." (R. 375, 433).

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"(ii) The use of additional flows of the Deschutes River and its tributaries pursuant to right which may be initiated hereafter for the diversion and storage of waters for domestic, municipal, stock and irrigation purposes in connection with any reclamation projects undertaken pursuant to the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplimentary therto), the amounts of water to be used under the additional rights, together with the uses under existing rights whatever they may be, not, by reason of the additional right, to exceed these quantities:

"(a) Deschutes River and its tributaries above Cline Falls — entire flow; (R. 443, 444)

"(b) Squaw Creek — all flows during the non-irrigation season; (R. 444)

"(c) Lake Creek — 20,000 acre-feet annually; (R. 444)

"(d) Crooked River and its tributaries — all the flows above the Highway Bridge at the place where U.S. Highway 97 crosses the Crooked River Canyon; (R. 444)

"(e) Crooked River below the Highway Bridge — not to exceed 2,500 acre-feet annually for the proposed Deschutes project domestic water system; and (R. 444)

"(f) An additional 400 second-feet that may be taken above the Licensee's project either from the Deschutes River below Cline Falls or the Crooked River below the Highway Bridge during the irrigation season." (R. 444).

The petitioners in the Petition for Review (R. 512-515), set forth fifteen findings of fact made by the Federal Power Commission in its Opinions and Order, issuing a license herein, which findings Petitioners contend were not supported by substantial evidence.

In order to avoid duplication, and also to relieve the Court of the burden and the necessity of perusing cumulative and repetitious argument concerning this phase of the case, the Izaac Walton League of America, Oregon Division, *amicus curiae,* will, in its Brief to be filed herein, argue these points.

Points on Which Petitioner Intends to Rely

1. The Federal Power Commission does not have jurisdiction, power, or authority to authorize and to license the construction, operation, and maintenance of the proposed project.

2. The Deschutes River and its tributaries are internal and non-navigable streams of the State of Oregon.

3. The proposed project will not affect interstate or foreign commerce.

4. The operation of the proposed project in conjunction with the re-regulating dam will prevent the project from adversely affecting interests downstream, and will not affect the navigable flow or the navigable capacity of the Columbia River.

5. There is no provision in the Federal Constitution delegating to the central government power to control the acquisition and use of non-navigable streams.

6. Under the Acts of Congress of 1866, 1870 and 1877 (Desert Land Acts 43, U.S.C.A. 321), the Federal Government irrevocably and unconditionally surrendered, or relinquished to the States, including the State of Oregon, whatever rights the government may have had to control the use of the waters of non-navigable streams.

7. Under the Territory Act of Oregon of August 14, 1848, it was provided that rivers and streams of water in the Territory of Oregon in which salmon are found, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.

8. Under the Constitution and laws of the State of Oregon, no person many construct a dam in any of the

streams of this State to a height that will make a fish ladder or fishway there-over impracticable, without first having obtained from the Fish Commission of Oregon a permit to construct such a dam.

9. Under the provision of Section 116-401, O.C.L.A., all waters within the State of Oregon, from all sources of water supply, belong to the public.

10. The common law doctrine of riparian rights has been abrogated in Oregon by statute.

11. Under the Constitution of Oregon, 1859, the rights, title, and interest in and to all water for the development of water power, and to water power sites which the State of Oregon owns or hereafter acquires, shall be held in perpetuity.

12. Under the provisions of the Oregon Water Code, the waters of the State of Oregon may not be appropriated without its consent.

13. No right to appropriate or to use the waters of the lakes, rivers, streams, or other bodies of water within the State of Oregon, including water over which the State has concurrent jurisdiction in connection with the development of any water power project for the generation of electricity, shall be initiated, perfected, acquired or held, without the consent of the State of Oregon.

14. The Federal Power Commission may not act as a substitute for the local authorities over such questions as the right to use, appropriate, divert, or impound the waters of a non-navigable stream in the State of Oregon.

15. The Federal Power Commission has no authority to allocate the use of the waters of the Deschutes River and its tributaries in connection with the Pelton project under the license granted to the Portland General Electric Company.

16. The Federal Power Commission has no authority to grant to the Portland General Electric Company, the applicant, a license to construct the project in question until the applicant has complied with Section 9(b) of the Federal Power Act by showing compliance with the laws of the State of Oregon.

17. The Fish Commission of the State of Oregon has denied a permit to the Portland General Electric Company to construct the Pelton Dam.

18. The Hydroelectric Commission of Oregon has denied the Portland General Electric Company's application, and supplemental applications, for a preliminary permit to construct the hydroelectric project in question.

II.

BRIEF OF AUTHORITIES

I

The rivers and streams of water in the territory of Oregon in which salmon are found shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.

Act of Congress (August 14, 1848, Territory of Oregon Act.) 9 Stat. L. Sec. 12, Ch. 177, p. 328.

II

"All laws in force in the territory of Oregon when this constitution takes effect, and consistent therewith, shall continue in force until altered or repealed."

Article XVIII, Sec. 7, Constitution of Oregon, 1859.

III

In the event that any person desires to construct a dam in any of the streams of this state to a height that will make a fish ladder or fishway thereover impracticable, in the opinion of the commission, then such person may make an application to the commission for a permit to construct such dam, and the commission is hereby authorized to grant such permit in its discretion, upon the condition that the person so applying for such permit shall convey to the sate of Oregon a site of the size and dimensions satisfactory to the commission, at such place as may be selected by the commission, and erect a hatchery and hatchery residence, according to plans and specifications to be furnished by the commission, and enter into an agreement with the commission, secured by a good and sufficient bond, to furnish all water and light without expense, to operate said proposed hatchery; and no permit for the construction of any such dam shall be given by the commission until the person applying for such permit shall have actually conveyed said land to the state and erected said hatchery

and hatchery residence in accordance with said plans and specifications.

Ch. 105, sec. 49, Oregon Laws 1921; O.C.L.A., Sec. 83-316.

IV

The common-law doctrine of riparian rights has been virtually abrogated in Oregon and for practical purposes appears to be no longer more than a legal fiction.

California Oregon Power Co. vs. Beaver Portland Cement Co., 295 U.S. 142, 164, 79 L. Ed. 1356, Jennison vs. Kirk 98 U.S. 453, 25 L. Ed. 240, Atchison vs. Peterson, 20 Wall. 507, 22 L. Ed. 414.

V

All waters within the state (Oregon) from all sources of water supply belong to the public.

O.C.L.A., sec. 116-401.

VI

The above section 116-403, O.C.L.A., abolish the rule that a riparian owner has the right to have a stream continue to flow substantially undiminished in its natural channel.

California-Oregon Power Co. vs. Beaver Portland Cement Co., 73 Fed. 2nd 555.

The common-law rule as to "continuous flow" of a stream, or riparian doctrine, may be changed by statute except as such change may affect some vested right.

Re: Water Rights of Hood River, 114 Or. 112, 227 P. 1065.

VIII

The Oregon water code has been sustained as constitutional by the Supreme Court of the United States.

California-Oregon Power Co. vs. Beaver Portland Cement Co., 295 U.S. 142, 79 L. Ed. 1356.

IX

The rights, title and interest in and to all water for the development of waterpower and to water power sites, which the state of Oregon now owns or may hereafter acquire, shall be held in perpetuity.

Article XI-D, sec. 1, Constitution of Oregon, 1859.

X

The Desert Land Act (Act of Congress, March 3, 1877, amended 43, U.S.C.A. 321) had the effect to sever all waters upon the public domain, not theretofore appropriated, from the land itself.

California-Oregon Power Co. vs. Beaver Portland Cement Co.

Brush vs. Commissioners of Internal Revenue, 300 U.S. 352.

Ickes vs. Fox, 300 U.S. 82, 57 S. Ct. 412.

XI

Under the federal Acts of 1866, 1870 and 1877 (Title 43, Section 661, United States Code annotated (14 Stat. 251, 16 Stat. 217)) the federal government irrevocably and unconditionally surrendered or relinquished to the states whatever rights the government may have had to control the use of waters of non-navigable streams in the West.

Jennison vs. Kirk, 98 U.S. 453, 25 L. Ed. 240,
California Oregon Power Company vs. Beaver Portland Cement Company, 295 U.S. 142, 55 S. Ct. 725,
Atchinson vs. Peterson, 20 Wall. 507, 22 L. Ed. 414,
Basey vs. Gallagher, 20 Wall. 670, 22 L. Ed. 452,
Broder vs. Natoma Water and Mining Company, 11 Otto 274, 25 L. Ed. 790,
United States vs. Rio Grande D. & I. Company, 174 U.S. 690, 706, 19 S. Ct. 770,
Gutierres vs. Albuquerque Land & Irrigation Company, 188 U.S. 545, 553, 23 S. Ct. 338.

XII

The power to legislate on the question of the acquisition and control of water rights has never been delegated to the United States and hence such power properly belongs o the individual states.

Kansas vs. Colorado, 206 U.S. 46, 94,
Fox vs. Ieckes, 137 Fed. 2nd 30.

XIII

The waters of the state of Oregon may not be appropriated without its consent.

Sec. 116-401 et seq. (Oregon water code O.C.L.A.)

XIV

From and after the date when this act takes effect no right to appropriate or to use the waters of the lakes, rivers, streams or other bodies of water within the state of Oregon, including water over which this state has concurrent jurisdiction, in connection with the development

of any water-power project for the generation of electricity, shall be initiated, perfected, acquired or held, except for and during the period or periods or extensions thereof as herein stated, and pursuant to the provisions hereof. (Ore. L. 1931, ch. 67, sec. 2, p. 82; O. C. 1935 Supp., sec. 47-2102.)

Sec. 119-102, O.C.L.A.

XV

From and after the taking effect of this act, no water-power project involving the use of the waters of any of the lakes, rivers, streams or other bodies within the state of Oregon, including waters over which this state has concurrent jurisdiction, for the generation of electricity, shall be begun or constructed except in conformity with the provisions hereof. Ore. L. 1931, ch. 67, sec. 3, p 83; O. C. 1935 Supp., sec. 47-2103.)

Sec. 119-103, O.C.L.A.

XVI

The refusal of the Fish Commission of Oregon and the Oregon Hydro-electric Commission to approve the Pelton Project is an absolute bar to the licensing of the proposed project. Sec. 9(b) Federal Power Act (16 U.S.C.A. 802 b.)

First Iowa Hydro-electric Cooperative vs. Federal Power Commission, 328 U.S. 152.

State of Iowa vs. Federal Power Commission, 399 U.S. 979.

III.

ARGUMENT

INTRODUCTION:

The Federal Power Commission, as we herefore have pointed out, found that the Deschutes River is a non-navigable stream; that the proposed project would not affect interstate or foreign commerce; that the operation of the proposed project, in conjunction with the regulating dam, would prevent the project from adversely affecting interests downstream since substantially all the natural river flow will be released through the dam at all times; that the proposed project will occupy lands of the United States; that under Section 10a of the Federal Power Act, the proposed project is in the public interest and will provide for comprehensive development of the Deschutes River and will be consistent with further comprehensive development of that stream and of the Columbia Basin (R. 418, 423, 425).

The Federal Power Commission therefore assumed jurisdiction in this case on the sole ground that the proposed project would occupy lands of the United States. In its findings, it eliminated all other jurisdictional grounds.

The petitioners contend, briefly, that under the Desert Land Acts (43 U.S.C.A. 321), the Federal government irrevocably and unconditionally surrendered and relinquished to the State of Oregon whatever rights the government may have had to control the use of the

waters of its non-navigable streams; that common law rule as to "contained flow" of a non-navigable stream, or riparian doctrine, has been changed by statute and laws of the State of Oregon; that said Desert Land Acts had the effect to sever all waters upon the public domain from the land itself; that the rights, title and interest in and to all waters of the State, and the right to regulate its use, are vested in the State; that the Sate of Oregon has refused to license the proposed project; that under Section 9b of the Federal Power Act (16 U.S.C.A. 802b), the refusal of the State to approve the project is an absolute bar to the licensing of the project by the Federal Power Commission; hence respondent had no jurisdiction or authority to issue the license to Portland General Electric Company, the Intervenor.

The Petitioners have specified eighteen points on which they intend to rely. These points, obviously, are embraced in the principal contentions of the Petitioners as above set forth. Hence, in the interest of brevity and to avoid unnecessarily belaboring the issues, Petitioner shall not undertake to argue them separately.

THE DESERT LAND ACT (ACT OF CONGRESS, MARCH 3, 1877, AMENDED 43, U.S.C.A. 321) HAD THE EFFECT TO SEVER ALL WATERS UPON THE PUBLIC DOMAIN, NOT THERETOFORE APPROPRIATED, FROM THE LAND ITSELF.

From the system of state control, enormous property rights have been developed in the West. The United

States Supreme Court has recognized that rights of water secured by conformity with state laws are vested property rights. There is no provision in the federal constitution delegating to the central government power to control the acquisition and use of non-navigable streams. The government, recognizing this position, has on occasion claimed that the United States has proprietary title in water and hence full power to dispose of and regulate such waters.

In the case of *Kansas vs. Colorado,* 206 U.S. 46, the United States invoked this provsion (Clause 2, Section 3, Article IV, United States Constitution) in support of its claim of national control as asserted in that case. The Court there, after referring to the constitution provision said (p. 89): "The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. * * * clearly it does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits."

Referring to this constitutional provision, i.e., power in the federal government to control the acquisition and use of *Ashwater vs. Tennessee Valley Authority,* 297 U.S. 288, 388, 56 S. Ct. 466:

> "The constitutional provision is silent as to the method of disposing of property belonging to the United States. That method, of course must be an appropriate means of disposition according to the nature of the property, it must be one adopted in

the public interest as distinguished from private or personal ends, and we may assume that it must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the states."

The states have taken the position that under the Federal Acts of 1866, 1870 and 1877, the federal government irrevocably and unconditionally surrendered or relinquished to the states whatever rights the governmay have had to control the use of the waters of nonnavigable streams in the West. The first of these federal Acts, that of July 26, 1866 (14 Stat. 251) and the second, that of July 9, 1870, (16 Stat. 217), are codified together as Section 661, Title 43, United States Code, which reads as follows:

"Whenever, by priority of possession rights to the use use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"All patents granted, or preemption or homsteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section."

The first paragraph of the above quoted section is from the original Act of 1866. The second paragraph is from the amendatory Act of 1870 and had for its purpose the clarification of the 1866 statute.

The third pertinent federal Act is the so-called "Desert Land Law" (Act of March 3, 1877, as amended, 43 U.S.C.A. 321), which, after providing for desert land entries, reads as follows:

> " * * * Provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing right."

Section 2 and section 3 of this 1877 Act (19 Stat. 377) further provides:

> "Section 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated—
>
> "Section 3. That this act shall ony apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico

> and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

The historical background of the Acts of 1866, 1870 and 1877 has been related many times. *Jennison vs. Kirk,* 98 U.S. 453, 25 L. Ed. 240, decided in 1879 contains an account of the 1866 law by Justice Field who did much to mold the form of the earlier decisions. It was there said (Jennison vs. Kirk, supra): "The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains."

With reference to the 1866 Act the decision had this to say:

> "It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already estabilshed, to which the people were attached."

A more recent decision, *California Oregon Power Company vs. Beaver Portland Cement Company,* 295 U.S. 142, 55 S. Ct. 725, decided in 1935 reviews the conditions in the West which lead to the passage of these three federal Acts and states (295 U.S. 157-158):

> "The streams and other sources of supply from which this water must come were separated from one another by wide stretches of parched and barren land which never could be made to produce agricultural crops except by the transmission of water for long distances and its entire consumption in

> the process of irrigation. Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that of appropriation. And this substitution of the rule of appropriation for that of the common law was to have momentous consequences. It became the determining factor in the long struggle to expunge from our vocabulary the legend 'Great American Desert' which was spread in large letters across the face of the old maps of the far west."

In *Atchinson vs. Peterson,* 20 Wall. 507, 22 L. Ed. 414, Justice Field after referring to the silent acquiescence of the United States in permitting the occupation of the public lands for mining and appropriation of water in connection with those operations said (22 L. Ed. 416, 20 Wal., 507, 513): "This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866."

In *Basey vs. Gallagher,* 20 Wall. 670, 683, 684; 22 L. Ed. 452, the same judge referred to the 1866 Act and said:

> "It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or the decisions of the courts."

In *Broder vs. Natoma Water and Mining Company,* 11 Otto 274, 276; 25 L. Ed. 790, it was held that the Act of 1866 was "rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

In *United States vs. Rio Grande D. & I. Company,* 174 U.S. 690, 706, 19 S. Ct. 770, it was said: "Obviously by these acts so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow."

Likewise *Gutierres vs. Albuquerque Land & Irrigation Company,* 188 U.S. 545, 553, 23 S. Ct. 388, held:

> "By the Act of March 3. 1877, c. 107, 19th Stat. 377, the right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, was granted * * *."

In the case of *California Oregon Power Company vs. Beaver Portland Cement Company* (supra), the power company which had appropriation rights from interfering with the water of Rogue River in Oregon. The Court reviewed at length the conditions in the West which lead to the passage of the Acts of 1866, 1870 and 1877, and commented upon these Acts and the decisions construing them. The decision reached was that the appropriation rights of the defendant were good and hence the injunction could not issue. The Court thus summarized its decision (295 U.S. 142, 163, 55 S. Ct. 725):

> "What we hold is that following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris,* subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."

The doctrine of the *California Oregon Power Company* decision has been reiterated in two subsequent opinions of the United States Supreme Court. We quote from *Ickes vs. Fox,* 300 U.S. 82, 95, 57 S. Ct. 412, wherein it was said:

> "The federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (c. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states."

This same controversy involving the Yakima project in the State of Washington, came before the United States Court of Appeals for the District of Columbia and a decision was rendered by that court on June 30, 1943. The Secretary of Interior attempted to limit the amounts of water which the farmers could secure under contracts with the Bureau of Reclamation to 3 or 3½ acre-feet per acre and to impose an additional charge if more water was desired. The Secretary had urged that the United States was an indispensable party, but the Supreme Court ruled otherwise holding (300 U.S. 82, 95, *supra)* that the appropriation of water was not for the use of the Government, but, under the Reclamation Act, for the landowners, and that the Government was simply a carrier and distributor of water with a lien upon the land and the water rights as security to assure

the repayment of the cost of construction and maintenance. The United States Court of Appeals (*Fox vs. Ickes,* 137 F. (2d) 30) ruled against the Secretary, holding that in the operation of the project he is in the position of a carrier of water to all entrymen under the project and that "he must distribute the available water according to the priorities among the different users which are established by the law of the State of Washington." The Appellate Court went on to say that "the amount of water, to which appellants are entitled by reason of prior appropriations for beneficial use can only be finally determined by a court of the State of Washington."

THE WATERS OF THE STATE OF OREGON MAY NOT BE APPROPRIATED WITHOUT ITS CONSENT.

From and after the date when this act takes effect no right to appropriate or to use the waters of the lakes, rivers, streams or other bodies of water within the state of Oregon, including water over which this state has concurrent jurisdiction, in connection with the development of any water-power project for the generation of electricity, shall be initiated, perfected, acquired or held, except for and during the perior or periods or extensions thereof as herein stated, and pursuant to the provisions hereof. (Ore. L. 1931, ch. 67, sec. 2, p. 82; O. C. 1935 Supp., sec. 47-2102.)

Sec. 119-102, O.C.L.A.

From and after the taking effect of this act, no water-power project involving the use of the waters of any of the lakes, rivers, streams or other bodies of water within the state of Oregon, including waters over which this state has concurrent jurisdiction, for the generation of electricity, shall be begun or constructed except in conformity with the provisions hereof. (Ore. L. 1931, ch. 67, sec. 3, p. 83; O. C. 1935 Supp., sec. 47-2103.)

Sec. 119-103, O.C.L.A.

Federal Government has only such powers as are delegated to it by the United States Constitution. All powers not so delegated are by the express provisions of the Tenth Amendment reserved to the states. The power to legislate on the questioin of acquisition and control of water rights in non-navigable streams has never been delegated to the United States and hence such power properly belongs to the individual states. This position was definitely decided in Kansas vs. Colorado (supra), wherein it is said:

> "It (a state) may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the west of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any state."

This principle was followed in the California-Oregon Power Company case (supra), the court holding that: "The full power of choice must remain with the state." To the same effect are United States vs. Rio Grande Dam and Irrigation Company, 174 U.S. 690, and

Gutierres vs. Albuquerque Land and Irrigation Company, 188 U.S. 545.

The State of Oregon, by constitution and statute in the adoption of its water code, has determined this right in favor of the appropriation doctrine. Sec. 116-401, O.C.L.A.; Article 11-D, sec. 1, Constitution of Oregon, 1859.

Constitution Article 11-D, section 1, Oregon Constitution, provides the rights, title and interest in and to all water for the development of waterpower and to water power sites, which the State of Oregon now owns or may hereafter acquire, shall be held in perpetuity.

Section 116-401, O.C.L.A., provides:

"All waters within the state (Oregon) from all sources of water supply belong to the public."

Under the provisions of section 116-401, O.C.L.A. the water of this state may not be appropriated by any person for any purpose without its consent.

Sections 119-102 and 119-103, O.C.L.A., provide in substance that no right to appropriate or to use the water of the lakes, rivers, streams or other bodies of water within the state in connection with the development of any waterpower project for the generation of electricity, shall be initiated, perfected, acquired or held, except in conformity with said act (Hydroelectric Power Act).

In the event that any person desires to construct a dam in any of the streams of this state to a height that will make a fish ladder or fishway thereover imprac-

ticable, in the opinion of the commission, then such person may make an application to the commission for a permit to construct such dam, and the commission is hereby authorized to grant such permit in its discretion, upon the condition that the person so applying for such permit shall convey to the state of Oregon a site of the size and dimensions satisfactory to the commission, at such place as may be selected by the commission, and erect thereon a hatchery and hatchery residence, according to plans and specifications to be furnished by the commission, and enter into an agreement with the commission, secured by a good and sufficient bond, to furnish all water and light without expense, to operate said proposed hatchery; and no permit for the construction of any such dam shall be given by the commission until the person applying for such permit shall have actually conveyed said land to the state and erected said hatchery and hatchery residence in accordance with said plans and specifications.

Ch. 105, sec. 49, Oregon Laws 1921; O.C.L.A., Sec. 83-316.

The Hydroelectric Commission of Oregon, as a condition precedent to the granting of applicant's application for a preliminary permit, required that it obtain from the Oregon Fish Commission a permit to construct the project in question. For reasons heretofore described, the Fish Committion twice refused to grant such permit.

Under the laws of this state, applicant may not appropriate or use the water of the state in connection

with the development of any waterpower project for the generation of electricity without first having obtained from the Hydroelectrict Commission of the State of Oregon a license so to do.

THE FEDERAL POWER COMMISSION HAS NO AUTHORITY TO GRANT TO THE PORTLAND GENERAL ELECTRIC COMPANY, THE APPLICANT, A LICENSE TO CONSTRUCT THE PROJECT IN QUESTION UNTIL THE APPLICANT HAS COMPLIED WITH SECTION 9(b) OF THE FEDERAL POWER ACT BY SHOWING COMPLIANCE WITH THE LAWS OF THE STATE OF OREGON.

This proposition was decided by the United States Supreme Court in *First Iowa Hydroelectric Cooperative vs. Federal Power Commission,* 328 U.S. 152 (1946). The supersedure by the Federal Power Act of *conflicting* state laws was further emphasized by the denial of certiorari when the Stae of Iowa attempted for the second time to impose its own statute in opposition to the federal license for this project, *State of Iowa vs. Federal Power Commission,* 399 U.S. 979 (1950), in which certiorari was denied thereby affirming the decision of the United States Court of Appeals for the Eighth Circuit, affirming order of the Commission granting the license. 178 Federal 2d, 421 (1949).

In the first Iowa Hydro-electric case (supra), petitioner applied to the Federal Power Commission for a license for a power project in Iowa involving the con-

struction of a dam on a *navigable** stream and the diversion of water from two *navigable** streams into another. Petitioner showed no attempt to comply with the Iowa Code, 1939, chapter 363, which forbids the construction of dams and the diversion of water for industrial purposes without a permit from the State Executive Council and authorizing the issuance of such permit upon the finding, *inter alia,* that "Any water taken from the stream * * * is returned thereto at the earliest practicable place." The State intervened and urged that the application be denied because the petitioner did not submit evidence of its compliance with the requirements of the Iowa Code for a permit from the State Executive Council. The Federal Power Commission found that a federal license for the project was required under the Federal Power Act and that the project was required under the Federal Power Act and that the project called for practical and reasonably adequate water power development with certain recreational advantages, all at a cost not appearing to be unreasonable; but it dismissed the application without prejudice on the ground of petitioner's failure to present satisfactory evidence, pursuant to section 9(b) of compliance with requirements of the laws of Iowa requiring a state permit.

The Court held that compliance with the requirements for a state permit under the Iowa Code is not a condition precedent to, or an administrative procedure that must be exhausted before, securing a federal license. In discussing this point the Court said: "It is the Federal Power Commission rather than the Iowa Executive

*Emphasis supplied.

Council that, under our constitutional government, must pass on issues affecting the use of *navigable** waters—on behalf of the people of Iowa as well as on behalf of all others." (p. 182)

On page 178 it is stated: "Upon the remand of this application to the Commission, it will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of applicant's legal title to riparian rights or the validity of its local franchise relating to proposed interstate public utility service." Also on page 178: "The reference in section 9 (b) to beds and banks of streams, to proprietary rights to divert or use water, or to legal rights to engage locally in the business of developing, transmitting and distributing power neither adds anything to nor detracts anything from the force of local laws, if any on these subjects."

Again, on page 167: "On the other hand, there is ample opportunity for the Federal Power Commission, under the power expressly given to it by Congress, to require by regulation the presentation of evidence to it of the petitioner's compliance with any of the requirements for a state permit on the *state waters of Iowa**; that the Commission considered appropriate to affect the possibility of a federal license on the *navigable** waters of the United States."

"The securing of an Iowa State permit is not in any sense a condition precedent or an administrative procedure that must be exercised before securing a federal

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*Emphasis supplied.

license. It is a procedure required by the State of Iowa in dealing with its *local* streams and also the waters of the United States within that state in the absence of an assumption of jurisdiction by the United States over the *navigability** of its waters. Now that the federal government has taken jurisdiction of such waters (navigable waters) under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements." (p. 170)

Also, on page 170: "This opposition (to the application) is based, at least in part, on the ground that the state statue, as interpreted by the state officials, expresses a policy opposed to the diversion of water from one stream to another in Iowa under such circumstances as the present."

The Court further emphasizes its decision on the *navigability** of the streams in question by stating: "The scope of the whole program has been further aided, in 1940, by the definition given to *navigable** waters of the United States in *United States vs. Appalachian Power Company,* 311 U.S. 377. Students of our legal evolution know how this correct interpretation of the commerce clause causes the Commission to lift *navigable** waters of the United States out of local control and into the domain of federal control. It was in the light of these developments that this petitioner in April, 1941, made application for a federal license for this enlarged project. This project thus illustrates the kind of a development, in relation to interstate com-

*Emphasis supplied.

merce and other *navigable** waters of the United States, that is brought forth in a new recognition of is value when viewed from the comprehensive viewpoint of the Federal Power Commission." (p. 171)

The Court, in disposing of the contention of the State of Iowa further says: The contention of the State of Iowa is comparable to that which was presented on behalf of forty-one states and rejected in this Court in *United States vs. Appalachian Power Company* (supra). The states possess control of the waters within their borders subject to the acknowledged jurisdiction of the United States under the constitution in regard to commerce and the *navigation** of the waters of rivers. It is this subordinate local control that, even as to *navigable rivers**, creates between the respective governments a contrariety of interests relating to the regulation and protection of water through licenses for the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possess the power to control the erection of structures in *navigable** waters. The point is that *navigable** waters are subject to national planning and control in the broad regulation of commerce granted in federal government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were not such relationship the plenary power of Congress over *navigable** waters would empower it to deny the privilege of constructing an obstruction in these waters. It may likewise grant the privilege on terms. It is in

*Emphasis supplied.

objection to the terms and to the exertion of the power that its exercise is attempted by the same incidents which attempt the exercise of the police power of the states. The Congressional authority under the com merce clause is complete unless limited by the Fifth Amendment." (p. 182) This case illustrates the integration of federal and state jurisdiction in licensing water power projects under the Federal Power Act.

The Deschutes River is a non-navigable stream. It supports no commerce. It is entirely a local stream. Its waters and the use thereof are subject to the sole jurisdiction of the State of Oregon.

Manifestly, the Supreme Court in the First Iowa Hydroelectric case held as it did because of the fact that the Iowa River and the Cedar River were navigable streams and that the proposed diversion of water from the Cedar River would substantially affect the flow and navigable capacity of the Iowa River, and that the operation of the proposed power project would cause fluctuation in the flow and navigable capacity in the Mississippi at Muscatine, Iowa.

It is clear, therefore, that the refusal of the state agency to grant a permit is not in conflict with the comprehensive development of the Deschutes River under the provisions of the Federal Power Act. There is no conflict between the Oregon laws and the Federal Power Act.

CONCLUSION

The petitioners respectfully contend that the order of the Federal Power Commission granting a license (major) to the Portland General Electric Company to construct the project in question is in violation of the constitution, statutes and laws of the State of Oregon; that the Federal Power Commission had no jurisdiction, power or authority to issue said order; that said Commission's fiindings, under Section 10(a) of the Federal Power Act, that the proposed project is best adapted to a comprehensive plan for all the purposes set forth in said statute is not supported by substantial evidence; that said order is in violation of Section 9(b) of the Federal Power Act for the reason that the applicant failed to present any evidence of its compliance with the laws of the State of Oregon with respect to the construction of said project; that the said Federal Power Commission had no jurisdiction, power or authority to authorize said applicant to use, divert and impound the waters of the Deschutes River, an internal, non-navigable stream of the State of Oregon.

WHEREFORE, petitioners respectfully pray that said order of the Federal Power Commission be set aside.

Respectfully submitted,

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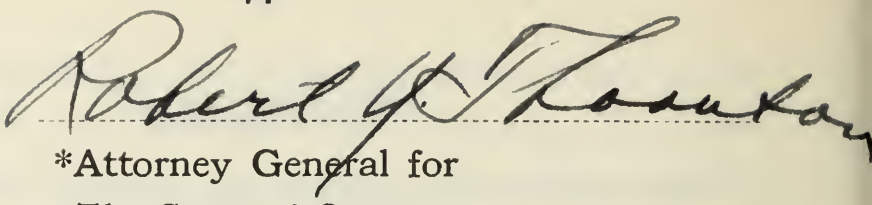

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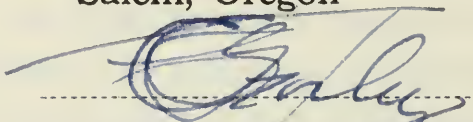

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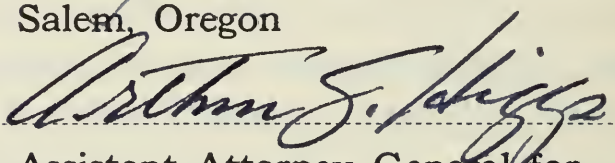

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